IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BECKRICH HOLDINGS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18116-NC
	)	
RANDY F. BISHOP and QUINT CORPORATION,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: March 22, 2005
Date Decided: June 9, 2005

Douglas A. Shachtman, Esquire, DOUGLAS A. SHACHTMAN & ASSOCIATES, Wilmington, Delaware, *Attorneys for Plaintiff*

Richard D. Levin, Esquire, Christos T. Adamopoulos, Esquire, CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

Plaintiff, Beckrich Holdings, LLC ("Beckrich"), and Defendant, Randall F. Bishop, own adjoining parcels of land separated by an access road (the "Spur") owned by Bishop. Both properties extend off of Bellecor Drive, the primary road providing ingress and egress to the properties in Bellecor Industrial Park in New Castle, Delaware. The Spur runs perpendicular to Bellecor Drive between the two properties. Beckrich brought this action to resolve a dispute regarding the existence of an easement over the Spur. Beckrich seeks a permanent injunction against Bishop's interference with Beckrich's use of the Spur and monetary damages. Bishop denies any liability and filed counterclaims seeking a permanent injunction against Beckrich's use of the Spur and more than two driveways off of Bellecor Drive,[1] and an order requiring Beckrich to restore Bishop's property to its *status quo ante,* as well as monetary damages.

The parties tried this case on August 4-6, 2004, and subsequently presented post-trial briefs and argument. This Memorandum Opinion reflects the Court's post-trial findings of fact and conclusions of law.

I. FACTS AND PROCEDURAL HISTORY

A. History and Ownership of the Properties

All of the properties located in the Bellecor Industrial Park (the "Industrial Park") were originally acquired by Delaware Power and Light Company ("DP&L") in 1929. In or around 1961, DP&L began to divide and sell portions of the Industrial Park to various

[1] Defs.' Countercl. ¶ 37. Based on the arguments in Bishop's briefing, the Court will treat this request as a request for a declaratory judgment that the addition of a new curb cut to the easement at issue would constitute an impermissible enlargement of the easement. *See* Def.'s Post-Trial Br. in Opp'n to Pl.'s Claims and in Supp. of his Countercl. ("DAB") at 18.

individuals and companies. Most of the parcels of land sold, however, did not have direct access to the public road, Basin Road. Consequently, DP&L's deeds to buyers reserved various right-of-ways and thereby created a network of easements to serve these properties. Specifically, two main parallel easements, a 30 foot easement and a 45 foot easement (the "Original Roads"), developed off of a common 50 foot easement joining the Original Roads to Basin Road. The 45 foot easement was conveyed to owners of properties located in the front of the Industrial Park closer to Basin Road, including Beckrich's predecessors-in-interest. The 30 foot easement was conveyed to owners of properties located in the back portion of the Industrial Park, including Bishop's predecessors-in-interest. The 30 foot easement extended beyond the 45 foot easement and included the Spur.

In or around 1988, certain Industrial Park property owners became frustrated with the declining condition of the Original Roads and the inefficiency in terms of repair and maintenance of having two parallel easements. David Lilly, president of Debelco Corporation ("Debelco"), Richard A. Hartman, vice president of The Briggs Company ("Briggs"), and a few other owners organized a series of meetings to discuss consolidating, repairing and improving the Original Roads. Certain property owners, such as James Vachris,[2] wanted to re-build and resurface the road wider and heavier so trucks serving the various companies located on the properties could traverse it. After negotiation, the Industrial Park property owners agreed to consolidate the Original Roads

[2] Tr. at 288 (Vachris). Citations in this form are to the trial transcript with the surname of the testifying witness indicated parenthetically, where applicable.

and contribute to the reconstruction of one primary road for ingress and egress to the Industrial Park properties.[3] This primary road was named Bellecor Drive. In consideration of the joint effort to reconstruct Bellecor Drive the parties to the negotiations agreed to convey reciprocal easement rights to, and collectively maintain, Bellecor Drive.

Lilly hired construction engineer John Reynolds to manage the reconstruction project. Reynolds solicited bids and coordinated the construction work. On May 16, 1988, Vandemark & Lynch ("V&L") surveyed the proposed easement and created a Road Construction Plan for use in the bidding and construction process. On July 15, 1988, Reynolds sent a memorandum to the Industrial Park property owners confirming that the construction costs would be divided by the owners in proportion to the area of property which each one owned.[4] After V&L created the Road Construction Plan, Lilly and Vachris, the owner of a parcel just behind Debelco's (Lilly's) property that did not abut Bellecor Drive, arranged for the Road Construction Plan to be expanded to include the Spur up to the Vachris property line.[5] In a memorandum dated August 8, 1988, Reynolds reported that the Road Construction Plan "as amended to include paving to the Vachris property line . . . for the sum of $105,000 [was] accepted" at the "road meeting."[6]

---

3 The owners included Henkels & McCoy, Inc., Beckrich's predecessor-in-interest.

4 Pl.'s Ex. ("PX") 3.

5 This portion of the Spur will be referred to as the Paved Spur.

6 PX 5. These road meetings were open to all Industrial Park property owners, but generally only Hartman, Lilly, Nicholas Gianoulis and Patricia White attended. Def.'s Ex. ("DX") 35 (Hartman Dep.) at 12-14.

Lilly also retained Frederick Altergott, Esq., a real estate attorney at the law firm he regularly used for corporate matters, to draft the necessary legal documents. Altergott became involved in the reconstruction project in August of 1988. Altergott prepared drafts of the Easement and Maintenance Agreement stating that the Road Construction Plan "best serves the parties" (the "Best Serves Recital"), and that therefore the owners of Bellecor Drive would convey an easement to the Industrial Park property owners in the property described in the Road Construction Plan.[7] The Road Construction Plan noted in these drafts, however, did not include the Spur.[8]

After Bellecor Drive and the paved portion of the Spur (the "Paved Spur") were reconstructed, V&L re-inspected and surveyed the property and prepared the As Built Plan to submit to the county to substantiate the final work. The As Built Plan includes the Paved Spur as part of the reconstruction. Thereafter, Altergott revised the Easement and Maintenance Agreement to substitute the As Built Plan for the Road Construction Plan in the Best Serves Recital.[9] Altergott testified that he also intended, but neglected, to change the language in the conveyance clause of the Agreement (the "Conveyance Clause") to similarly reflect that the easement being conveyed related to the property as depicted in the As Built Plan. The Court finds Altergott's testimony credible and concludes that he did intend to revise the language in the Agreement to convey an

---

7 *See* Joint Ex. ("JX") 3, 4.

8 *See* Tr. at 47-48 (Altergott).

9 JX 1.

easement in the property as reflected in the As Built Plan, rather than the Road Construction Plan.

After the Easement and Maintenance Agreement was signed, Hartman administered the Highway Maintenance Trust for approximately eight years, until 1997. Hartman collected fees from the property owners, arranged for maintenance of Bellecor Drive and paid all bills incurred in such maintenance. Notably, Hartman testified that the maintenance he oversaw did not include secondary or access roads.[10]

In the mid to late 1990s, the parties to this litigation acquired their current properties in the Industrial Park as detailed below.

1. The Bishop Properties

On December 6, 1961, DP&L conveyed its land just south of Debelco's parcel to LSW Corporation ("LSW"). In 1965, Debelco and the other back property owners that owned the Spur expressly granted LSW use of the Spur. On May 27, 1970, LSW sold its property to Vachris (the "Vachris Property").

On January 3, 1994, Debelco sold its property at 23 Bellecor Drive, which includes the Spur, to Bishop (the "Bishop Property"). The deed from Debelco to Bishop specifically includes the easement created by the Easement and Maintenance Agreement.

On October 22, 1999, Bishop purchased the Vachris Property, which was and is undeveloped. In fact, much of the Vachris Property cannot be developed because portions of it are protected wetlands.

---

[10] *See* DX 35 at 28-29.

2. The Beckrich Property

Beckrich owns 9 Bellecor Drive (the "Beckrich Property"). This parcel was originally owned by DP&L as discussed above. By the time the various Industrial Park property owners were negotiating the reconstruction of Bellecor Drive, Henkels & McCoy owned the Beckrich Property. Henkels & McCoy later sold the property to Karl Krauss. On April 1, 1999, Beckrich bought the property from Krauss. Before selling the property, Krauss shared with Beckrich his own plans for subdividing it and utilizing the Spur to gain access to the back portion.[11]

B. Beckrich's Use of the Paved Spur

The principal of Beckrich is Richard Piendak. Piendak also owns Richards Paving Company ("Richards Paving"), which uses the Beckrich Property to store materials and equipment. In late 1999, Beckrich decided to make better use of the back portion of the Beckrich Property by constructing a self-service storage facility, using containers similar to those used for shipping. To develop this storage facility, Beckrich installed a stone asphalt base and placed twenty storage containers in an area on its property about sixty feet from the end of the Paved Spur. These changes evidently caused water to drain onto the Vachris Property. After receiving notice of that problem, Beckrich installed a ten inch drainage line and catch basin to remedy the situation.

Based on research about the self-service storage industry, Beckrich placed an ad in the yellow pages pricing its storage containers at $85 a month. A gate at the end of the Paved Spur, however, blocked access to the remainder of the Spur and the back of the

[11] *See* Tr. at 78-79 (Piendak); DX 45 (Krauss Dep.) at 11.

Beckrich Property. In order to reach the storage units from the Spur, customers had to travel over the Paved Spur and then over an unpaved portion of the Spur past the Vachris Property line (the "Unpaved Spur") before reaching the Beckrich Property. Piendak unilaterally removed the gate along with two survey stakes. Additionally, the Court finds that Beckrich, or its agents, in an effort to develop access to the back portion of the Beckrich Property, entered onto the Vachris Property and the Unpaved Spur, leveled out the area, including some piles of fill, and put down a stone base.[12] By doing this, Beckrich replaced a steep upward hill that had existed between the Unpaved Spur and the Beckrich Property with a gentle upward slope leading to his storage unit area.[13] Bishop, who currently owns both the Vachris Property and the Unpaved Spur, did not authorize any such work.[14] The change in grade altered the drainage pattern and has created the potential for additional wetlands to develop on the Vachris Property that could reach protected status within two years.[15]

---

12 *See* Tr. at 614-15 (Piendak).

13 *See* DX 45 at 41-42.

14 The Court finds that Bishop had no motivation to change the elevation of the Unpaved Spur or the Vachris Property. In fact, if the new drainage pattern caused wetlands to develop and gain protected status, the value of the Vachris Property would decrease because such wetlands could not be developed without creating wetlands of an equal size somewhere else on Bishop's property. *See* Tr. at 574 (McCulley, Bishop's environmental science expert). On the other hand, the Court finds that Beckrich, who admittedly was trying to better utilize the back portion of the Beckrich Property by creating a self-service storage unit area, did have the motivation to facilitate access to that portion of its property by lessening the grade of the steep hill that previously had existed.

15 *See id*. at 549-54 (McCulley).

Bishop complained to Piendak about the removal of the gate and survey stakes and the work that had been done to the Unpaved Spur and Vachris Property. Beckrich reinstalled the gate and survey stakes. By late October 1999, however, Beckrich and Bishop had reached an impasse on the use of the Spur. Beckrich claimed that it had been deeded an easement to use the Spur by Krauss. Beckrich's deed from Krauss conveys the Beckrich Property:

> TOGETHER with the free and uninterrupted right, use and privilege for ingress, egress and regress to an [sic] from the above described premises [the Beckrich Property] over Bellecor Drive, a private road owned by Highway Trust, as more specifically described in and subject to the terms and conditions contained in the Easement and Maintenance Agreement undated, and recorded in the New Castle County Recorder of Deeds Office at Deed Book 1145, Page 0198.[16]

Bishop claimed that he had been advised by Lilly that the Paved Spur was not open to use by all Industrial Park property owners.[17] Bishop thereafter blocked Beckrich's access to the Spur. Consequently, no self-service storage customers could access the rear of Beckrich's property using the Spur. Beckrich advised Bishop that he was incurring damages due to the blockage of the Spur and considered Bishop responsible for those damages.

II. ANALYSIS

Beckrich first argues that it obtained an easement over the Paved Spur when Krauss deeded its property to Beckrich. Beckrich further argues that even if it did not obtain an easement when it purchased its property in the Industrial Park, it is entitled to

---

16 JX 72.

17 *See* Tr. at 346 (Bishop).

an easement over the Paved Spur, possibly even the entire Spur, by imposition of a constructive trust and under the doctrines of equitable estoppel and unclean hands. Bishop counters that Beckrich's predecessors-in-interest were never granted an easement over any portion of the Spur and, therefore, no such easement was deeded to Beckrich. Bishop also argues that no actions have occurred that would give rise to an equitable right to an easement over any portion of the Spur.

In his counterclaims, Bishop alleges that Beckrich, or its agents, dumped a large amount of fill on the Unpaved Spur and changed the topography of the Unpaved Spur and Vachris Property. According to Bishop, this and other actions of Beckrich also altered the drainage pattern that existed on the properties and is causing water to collect on the Vachris Property and develop wetland areas. Beckrich denies that it dumped any fill on the properties.

A key issue in dispute is whether Beckrich possesses an easement over any portion of the Spur. Hence, the Court will address this issue first.

A. Did Beckrich Obtain Easement Rights to the Spur When it Purchased the Beckrich Property?

Beckrich argues that because the Easement and Maintenance Agreement stated that the As Built Plan best serves the needs of the parties, and the As Built Plan reflects the inclusion of the Paved Spur in the reconstruction, the Agreement should be read to give all parties to the Agreement an easement over the Paved Spur. Bishop argues that while the Agreement mentions the As Built Plan, the Conveyance Clause specifically grants an easement over the property reflected in the Road Construction Plan, which does

not include the Paved Spur. Therefore, the Agreement, according to Bishop, does not convey any easement rights over the Paved Spur.

If a contract is clear and unambiguous on its face, a court will ascertain the parties' intent by giving the contract language its ordinary and usual meaning.[18] The Delaware Supreme Court has held that:

> In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein. Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan.[19]

The parol evidence rule generally bars the use of extrinsic evidence to vary the terms of a formal written understanding. Exceptions to this rule apply, however, to prove fraud, illegality, accident or mistake, and to aid in the interpretation of ambiguous terms.[20] Beckrich contends that the Agreement is ambiguous.

1. Is the Easement and Maintenance Agreement clear and unambiguous?

The Court finds the Easement and Maintenance Agreement ambiguous on its face. The Agreement, at recital (c), the Best Serves Recital, states that:

> [T]he As Built Plan for a newly constructed private road dated January 27, 1989, Project No. 17082.04, File No. 26083-L prepared by Vandemark & Lynch, Inc., attached

---

18 *See Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996); *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

19 *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) (internal citations omitted).

20 *New Castle County v. Crescenzo*, 1985 WL 21130, at *3 (Del. Ch. Feb. 11, 1985).

> hereto as Exhibit A, which Plan incorporates Parcel No. 10-013.00-022, best serves the parties hereto and that the aforesaid currently existing 50 feet wide and 45 feet wide previously used private road referred to in (a) above shall be abandoned.[21]

Just two paragraphs later, however, section 1, the Conveyance Clause, states that the "Highway Trust hereby grants and conveys . . . the perpetual and uninterrupted easement and right of way over the lands and premises of Highway Trust as shown on said Road Construction Plan for the purpose of ingress, egress and regress."[22]

The Agreement's reference to the As Built Plan as "best serv[ing] the parties" directly before it states that it abandons the then existing system of easements providing ingress and egress to the parties, suggests that the As Built Plan is meant to replace the old system of easements. Additionally, the Conveyance Clause's reference to the "*said* Road Construction Plan"[23] creates confusion. The word "said" just before "Road Construction Plan" does not have a predicate because the Road Construction Plan is not previously referred to, or defined, in the Agreement. Furthermore, the Agreement gives project and file numbers when referencing a document for the first time and, when referring to specific plans, generally includes a copy as an attachment. The reference to the Road Construction Plan in the Conveyance Clause, however, does not set forth any project or file numbers. Thus, the reference format is inconsistent with the rest of the Agreement. Though project and file numbers for the Road Construction Plan are set

---

21 JX 1.

22 *Id*.

23 *Id.* (emphasis added).

forth two paragraphs after the Conveyance Clause in a paragraph discussing maintenance, the portion of the Road Construction Plan attached to the Agreement details only the proportion and type of materials used in the reconstruction, not the area over which an easement was to be conveyed.

Bishop argues that the Conveyance Clause, rather than the language of the Best Serves Recital should control any reading of the Agreement. Bishop is correct that "[g]enerally, recitals are not a necessary part of a contract and can only be used to explain some apparent doubt with respect to the intended meaning of the operative or granting part of the instrument. If the recitals are inconsistent with the operative or granting part, the latter controls."[24] In this case, however, even without looking to the Best Serves Recital, the Agreement's reference to the "said" Road Construction Plan in the Conveyance Clause without listing any file or project number, without previously defining the plan and without attaching the relevant portion of the Road Construction Plan creates ambiguity. The fact that the Agreement refers to the As Built Plan, depicting both Bellecor Drive and the Paved Spur, in the Best Serves Recital and includes it as an attachment only increases the ambiguity already present in the Agreement. Therefore, having found the Agreement ambiguous, the Court will look to extrinsic evidence to interpret the Agreement and discern the parties' intent.

a. Extrinsic evidence

The extrinsic evidence presented to the Court demonstrates that the parties intended to create an easement over all of the portions of road in the Industrial Park that

[24] *Crescenzo*, 1985 WL 21130, at *3.

were paved pursuant to the Agreement. The undisputed evidence demonstrates that the initial drafts of the Easement and Maintenance Agreement referred to the Road Construction Plan in both the Best Serves Recital and the Conveyance Clause.[25] The evidence also demonstrates that sometime after the Road Construction Plan was created, Lilly and Vachris arranged to expand that Plan to provide for pavement of the Spur up to the Vachris Property line. Thereafter, Bellecor Drive, as well as a portion of the Spur, was paved and the paved area was memorialized in the As Built Plan.

To support his position that the parties intended to grant an easement over the property depicted in the As Built Plan, which includes the Paved Spur, Beckrich relies on testimony of Altergott. Altergott, the attorney who prepared the Easement and Maintenance Agreement, testified that he intended to change both the Best Serves Recital and the Conveyance Clause to refer to the As Built Plan, but mistakenly failed to change the reference in the Conveyance Clause.[26] The Court finds Altergott's testimony credible

---

[25] Thus, the reference to "said Road Construction Plan" in the Conveyance Clause of the initial draft would not have been ambiguous.

[26] *See* Tr. at 54. While cross-examining Altergott, Bishop's counsel tried to suggest that he mistakenly failed to delete the word "said" before "Road Construction Plan" in the Conveyance Clause. Altergott denied that. *See id*. at 59. Interestingly, Vachris's attorney, Francis Trzuskowski, sent Altergott his comments regarding a draft of the Agreement with the ambiguous reference to the "said Road Construction Plan" and suggested that he insert after the Best Serves Recital's reference to the As Built Plan "(hereinafter 'Road Construction Plan')." *See* PX 8. Such a definition would have clarified that the "said Road Construction Plan" referred to in the Conveyance Clause meant the As Built Plan attached to the Agreement. Altergott testified that he did not incorporate this comment into the Agreement because he had already sent the final draft to the parties for signature.

At the time Trzuskowski sent this comment to Altergott, he had not specifically reviewed the Agreement with his client. Nevertheless, Vachris had been actively seeking his attorney's advice in connection with the reconstruction

because he lacks any motivation to claim that he erred if, in fact, he did not, and the documentary evidence supports his testimony. To construe the Agreement, however, the Court must ascertain the *parties'* intent, and Altergott testified that he spoke only with Lilly and could not testify to all of the owners' intents.[27]

The testimony regarding the parties' actual intent was confusing and, in some respects, conflicting. Although Vachris considered it fair for the other parties not to have access rights to the Paved Spur because "that was all part of the deal,"[28] the deal he describes is one where everyone pays for their pro rata share of the reconstruction.[29] Likewise, Hartman's testimony was inconsistent. For example, Hartman testified that he believed that the Agreement excluded all secondary roads such as the Paved Spur.[30] Yet, he also testified that Briggs would not have participated in paying for something they were not going to get access to, and Briggs, in fact, did pay for reconstruction of the

---

efforts. Therefore, the Court finds it reasonable to infer that Trzuskowski had at least a general understanding of his client's intentions.

27 *See* Tr. at 54-55, 60.

28 *Id.* at 311 (Vachris).

29 In fact, Vachris's testimony regarding his right to exclusive use of the Spur under the Agreement appears to stem from his belief that no one else had the need or desire to use the Spur. While he testified that he would not have given up his access rights to the Spur, because without such rights his land would have been inaccessible, he admittedly never thought about whether his right to use the Spur had to be exclusive. *See id*. at 285-86.

30 *See* DX 35 at 20-21 ("[W]e all clearly knew what our responsibility was . . . [f]rom our property line in was our responsibility").

Paved Spur.[31] This inconclusive collection of testimony regarding the intent of the parties to the Agreement undermines Bishop's contention that the Agreement did not convey an easement over the Spur.

The Court finds most persuasive the statement in Reynold's memorandum that it was agreed at the "road meeting" that "Vandermark [sic] and Lynch's drawing dated May 16, 1988 and as amended to include paving to the Vachris property line . . . for the sum of $105,000 [was] accepted," and that "[a]ll parties shall have equal right of way and access to the referenced road."[32] All of the property owners were sharing in this $105,000 cost.[33] The only relevant comment received after this memorandum expressed concern on the part of Vachris and his attorney that "somebody should spell it [the property conveyed] all out."[34] No one claimed that the assertions Reynolds made in his memorandum were incorrect. Based on a careful review of all the evidence, I find that Beckrich has established by a preponderance of the evidence that the parties intended the Easement and Maintenance Agreement to grant an easement to all parties to the

---

31 *See id.* at 21 ("[W]hy should we [Briggs] pay for somebody else's access?"), 43 ("I do not believe that Briggs would have agreed to participate in paying – in paying for a part of that spur that they had no access to.").

32 PX 5.

33 PX 4 identifies the cost of the reconstruction as $105,000 for the construction, $20,000 for an escrow account to provide for engineering and layout work and other expenses beyond the contractor's estimates, and $5,000 for Reynold's services. Therefore, the total for the reconstruction was $130,000, and it was to be paid for pro rata by all of the parties to the Agreement. *See* JX 1, Ex. B.

34 PX 7. *See also* PX 6.

Agreement over both Bellecor Drive and the Paved Spur.[35] To the extent Hartman and Vachris testified otherwise, the Court finds their testimony unpersuasive.[36]

2. Does Beckrich's easement to use the Paved Spur give it direct access to his storage containers?

The Court has determined above that the intent of the parties to the Easement and Maintenance Agreement was to convey an easement over the paved portion of road memorialized in the As Built Plan. The As Built Plan shows the Paved Spur extending to

---

35 Because I find that the evidence demonstrates that the parties intended to convey an easement in the entire paved area, *i.e.*, Bellecor Drive and the Paved Spur, I need not address arguments regarding an equitable right to an easement over the Paved Spur, unclean hands and reformation due to a scrivener's error. Beckrich's arguments regarding an equitable right to the creation of an easement over the Unpaved Spur are addressed *infra* in Section II.A.2.

Bishop contends that a declaration that the Paved Spur is part of the easement conveyed would not be an appropriate remedy because it would not compensate the other property owners in the Industrial Park. The Court disagrees. All parties to the Agreement, not just Beckrich, now have an express easement over the Paved Spur. Bishop has failed to show that any of the parties to the Agreement, other than himself, are prejudiced by the Court's determination of the parties' intent when making the Agreement.

36 Hartman testified that the Trust never paid for maintenance of the Paved Spur while he was its administrator. This evidence, however, is not necessarily inconsistent with Beckrich's reading of the Agreement as conveying an easement over the Paved Spur. Given Hartman's testimony that areas within each owner's property line were their own responsibility and the fact that none of the parties to the Agreement other than Lilly and Vachris had any need to use the Spur, the parties reasonably could have intended to convey an easement over the entire paved area including the Paved Spur, while requiring joint maintenance of only Bellecor Drive.

Additionally, it is unclear who, if anyone, paid for maintenance of the Paved Spur before 1994. Vachris testified that the snow plowing expense for "the entire road [Bellecor Drive and the Spur]" was shared pro-rata by the property owners. Tr. at 284-85.

the Vachris Property line, not back to Beckrich's storage containers. Bishop currently owns the property in question past the Paved Spur, the Unpaved Spur.

Beckrich argues that the Court, in equity, should grant it an easement past the Paved Spur because "Bishop has not demonstrated that he will suffer any further prejudice from allowing the access to continue to the end of the Spur."[37] There is no requirement, however, that Bishop demonstrate that he will be prejudiced to prevent extension of the express easement. Bishop owns the Unpaved Spur and no easement over the Unpaved Spur was created by the Easement and Maintenance Agreement. Beckrich's arguments for the creation of an easement under the equitable doctrines of estoppel, constructive trust and unclean hands are all based on alleged unjust enrichment to Lilly and Vachris. This unjust enrichment, however, stems from the fact that all of the parties to the Agreement contributed to the reconstruction of the Paved Spur, yet, contrary to certain parties' understanding, Bishop denied them an easement over it. Unlike the Paved Spur, the Unpaved Spur was never the subject of the Agreement and it was not improved by the parties to it. Therefore, no unjust enrichment exists with regard to the Unpaved Spur, and Beckrich's arguments based on the equitable doctrines of estoppel, constructive trust and unclean hands all fail.

Beckrich's second argument for the creation, in equity, of an easement over the Unpaved Spur is that "[i]n effect, the back portion [of the Beckrich Property] is land-

---

[37] Pl.'s Reply Br. in Supp. of its Claims and Answering Br. in Opp'n to Def.'s Claim ("PRB") at 9.

locked." While landlocked properties may give rise an easement by necessity,[38] the Beckrich Property is not landlocked. Bellecor Drive provides it ingress and egress. It is well settled that convenience alone will not suffice to create an easement by necessity.[39] Moreover, Beckrich, through its related company Richards Paving,[40] appears to have contributed to the difficulty in accessing the back portion of the Beckrich Property. By stockpiling broken concrete and other debris on the front portion of the Beckrich Property, Richards Paving has made it impassible for potential self-service storage customers.[41] The argument that this should give rise to a right to use Bishop's Unpaved Spur is without merit. Therefore, the Court finds no equitable grounds for the creation of an easement over the Unpaved Spur.

3. Beckrich's use of more than two driveways; permissibility of additional curb cuts

In anticipation of an attempt by Beckrich to access its storage units from the Paved Spur, Bishop requests a declaratory judgment that the addition of a curb cut to the easement, as defined by the As Built Plan, would constitute an impermissible enlargement of the easement.[42] Declaratory judgments are meant to afford relief from

---

38 *See Pencader Assoc., Inc. v. Glasgow Trust*, 446 A.2d 1097, 1099 (Del. 1982).

39 *See id.* at 1100; *Richard Paul, Inc. v. Union Improvement Co.*, 86 A.2d 744, 746 (Del. Ch. 1952).

40 As noted above, Richards Paving is also owned by Piendak, the owner of Beckrich.

41 Tr. at 98-100 (Piendak).

42 *See* DAB at 17-18.

uncertainty regarding rights.[43] "A court will exercise its discretion to grant declaratory relief when the benefit outweighs the risk of premature judgment."[44] In order for a court to exercise declaratory judgment jurisdiction, however, an "actual controversy" must exist.[45] An actual controversy is one: (1) that involves rights or other legal relations of the party seeking declaratory relief; (2) in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) that is between parties whose interests are real and adverse; and (4) where the issue involved in the controversy must be ripe for judicial determination.[46] In determining whether a claim is ripe, the courts have held that:

> [A] practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.[47]

---

43 *See* 10 *Del. C.* § 6512 ("its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights").

44 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2005 WL 1048802, at *14 (Del. Ch. Apr. 1, 2005).

45 *See Beck v. Brady*, 2004 WL 2158052, at *1 (Del. Ch. Sept. 21, 2004).

46 *See Gannett Co. v. Bd. of Managers for the Del. Criminal Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).

47 *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *11 (Del. Ch. Oct. 10, 2000) (quoting *Schick, Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1238 (Del. Ch. 1987)).

Because Beckrich has not asserted that it intends to put an additional curb cut into the Paved Spur,[48] the Court finds that the issue of curb cuts is not ripe for adjudication. The issue presented to the Court by both parties was whether an easement over the Paved Spur exists. Further delay does not present a significant hardship to the parties, but rather provides them with the opportunity to reassess the situation in light of the Court's ruling. Additionally, changes to the easement conveyed in the Easement and Maintenance Agreement are likely to impact the successors in interest of all of the parties to the Agreement, not just the two parties currently before the Court. Furthermore, the facts and the applicable law may need to be further developed to permit an informed determination of the issue of an additional curb cut. Potentially, relevant facts requiring more development include other Industrial Park property owners' use of Bellecor Drive and the Paved Spur and any attempts to add new curb cuts since the property owners entered into the Easement and Maintenance Agreement. Therefore, the Court declines to issue a declaratory judgment regarding the permissibility of adding a curb cut to the easement conveyed by the Agreement at this point in time on the ground that the issue is not ripe.[49]

---

[48] Beckrich only argues that Bishop waived his claim that the addition of curb cuts constitutes an impermissible enlargement of the easement because Bishop himself has a curb cut onto his property not depicted in the As Built Plan.

[49] For similar reasons, the Court does not reach Beckrich's contention that Bishop waived his right to protest the addition of curb cuts.

B. Beckrich's Claim for Injunctive Relief

Similarly, the Court finds Beckrich's request for an injunction prohibiting Bishop from interfering with Beckrich's use of the Spur premature. A court will grant a permanent injunction only where the plaintiff can prove: "(1) actual success on the merits, (2) irreparable harm [absent the injunction] and (3) the harm resulting from failure to issue an injunction outweighs the harm befalling the opposing party if the court issues the injunction."[50]

Beckrich has failed to demonstrate success on the merits with regard to its use of the Unpaved Spur or that it will suffer irreparable harm if the Court does not issue a permanent injunction. While Beckrich claims that Bishop interfered with his use of the Spur by placing a gate and concrete barriers at the end of the paved road, these actions only prevented Beckrich's use of the Unpaved Spur. I have concluded that Beckrich has shown only that he is entitled to an easement over the Paved Spur and not the Unpaved Spur. Beckrich has presented no evidence that Bishop has interfered in any significant way with its use of the Paved Spur. Furthermore, to the extent the interference Beckrich seeks to enjoin relates to possible actions by Bishop in the future if Beckrich were to attempt to add a new curb cut to the Paved Spur, I find that claim to be premature for the reasons discussed in Section II.A.3 *supra*. The permissibility of an additional curb cut is not yet ripe. Therefore, I deny Beckrich's claim for a permanent injunction.

---

[50] *Nebenzahl v. Miller*, 1996 WL 494913, at *1 n.2 (Del. Ch. Aug. 26, 1996).

C. Beckrich's Claim for Damages

Beckrich argues that its loss of income from the self-service storage unit rentals from October 1, 2000 until October 1, 2004 is a proximate result of Bishop's refusal to allow Beckrich to use the Spur. Though Bishop did prevent Beckrich's use of the Spur, Beckrich could not have used the Spur to access the storage containers without trespass onto Bishop's property, namely the Unpaved Spur. Additionally, Beckrich could have required its tenant, Richard's Paving, to move its stockpiles of debris to create a route within the Beckrich Property to access the storage units. Therefore, the Court finds that Bishop's actions were not the proximate cause of Beckrich's lost profits and denies his claim for lost-profit damages.[51]

D. Bishop's Counterclaims

Bishop claims that Beckrich is liable under the theories of nuisance and trespass for damages caused by the placement of fill onto and alteration of the drainage of the Unpaved Spur and Vachris Property. The parties vehemently dispute who is responsible for the placement of fill on those properties. Most of the relief Bishop seeks, however, is in relation to damages from new drainage caused by Beckrich's grading of the Unpaved Spur and Vachris Property. The Court will address each theory of recovery below.

A private nuisance generally is defined to be anything that results in harm, inconvenience or damage, or which materially interferes with the enjoyment of rights or

---

[51] *See Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965) ("Our time-honored definition of proximate cause . . . is that direct cause without which [an injury] would not have occurred.").

property of a particular entity.[52] The Delaware Supreme Court has found, for example, that "the continued flowing and collecting of large amounts of surface water upon plaintiffs' land caused by the defendant's negligent grading of the adjacent land" was a nuisance that reasonably gave rise to a court order directing defendants to abate the nuisance.[53] Trespass is a strict liability offense, the elements of which are entry onto real property without the permission of the owner.[54] Furthermore, trespass "may be said to consist of the intrusion of water from a condition created by the [defendant] which interferes with plaintiffs' use of their property."[55]

Bishop requests that the Court require Beckrich to pay for the cost of returning the topography of the Unpaved Spur and Vachris Property to their prior states. The Court, however, finds the evidence regarding the topography of the properties at the time Beckrich acquired its property in April 1999 lacking. Bishop introduced a comparative topography diagram by V&L that purports to contrast the properties' topography in 1998 with that of 2004.[56] While this survey shows that the topography was altered, the

---

52 *See Cunningham v. Wilmington Ice Mfg. Co*., 121 A. 654, 654 (Del. Super. 1923). *See also Restatement (Second) of Torts* § 821D (1979) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.").

53 *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 579 (Del. 1964). The standard for proving nuisance is one of preponderance of admissible evidence. *Hildebrand v. Watts*, 1997 WL 124150, at *6 (Del. Ch. Feb. 18, 1997).

54 *See Gordon v. Nat'l R.R. Passenger Corp*., 2002 WL 550472, at *5 (Del. Ch. Apr. 2, 2002); *Alfieri v. State*, 1984 WL 478437, at *3 (Del. Ch. Aug. 8, 1984).

55 *Alfieri*, 1984 WL 478437, at *3.

56 DX 36.

evidence at trial further demonstrated that V&L did not take detailed measurements of the properties when it prepared the 1998 survey. Rather, V&L only measured the boundary lines between the Beckrich and Vachris Properties in 1998 and then, without taking new measurements, utilized preexisting 1995 elevation points as the 1998 elevation points.[57] In fact, when asked to compare the few points actually taken in 1998 to the 1995 points, V&L admitted that those elevations had increased approximately five feet.[58] Therefore, the relevant topography in or around 1999 is unclear. This fact makes it difficult to determine who was responsible for the placement of the fill.

Additionally, testimony regarding fill that may have existed on the Unpaved Spur and Vachris Property before Beckrich purchased its parcel in the Industrial Park is conflicting. Bishop testified that fill was dumped on the Unpaved Spur and Vachris Property just before and after he bought the Vachris Property in October 1999.[59] Krauss testified that he did not dump fill onto the Unpaved Spur or Vachris Property, and that the area appeared "wider and flatter" in a recent photograph than it had been when he owned the Beckrich Property.[60] Vachris testified that the area was "a lot higher" and "filled."[61]

---

57 Tr. at 508-11 (O'Keefe, associate at V&L).

58 *See id.* at 524 (O'Keefe). In addition, during the three weeks between his deposition and trial, O'Keefe changed his opinion regarding the area affected by the fill, doubling the size of the area from 5,000 to 10,000 square feet. *See id*. at 516-17. While such a major change undermines O'Keefe's credibility, I do not need to determine the size of the area affected by the fill for the purposes of this decision.

59 *See id*. at 366-69.

60 DX 45 at 26-27, 38-39. *See also* JX 19 at B-497.

61 *See* Tr. at 294.

On the other hand, Vachris admits that some dumping occurred on his property before 1999, when he sold it to Bishop. This is confirmed by testimony of Stephen Robinson, Beckrich's attorney, who viewed the surrounding parcels before Beckrich purchased its property and noted piles of dirt six feet high that appeared to have been dumped in the last two or three months.[62] Additionally, Krauss testified that he leveled out piles of dirt on the Vachris Property to get an "even grade that would drain."[63] This grading may or may not have been done after the 1995 survey.[64] Based on this inconclusive testimony and the unreliability of the 1998 topography survey, the Court finds that Bishop failed to prove by a preponderance of the evidence that Beckrich dumped additional fill onto the Unpaved Spur and Vachris Property, except as may be related to the alleged change in grading discussed below. Consequently, the Court will not order Beckrich to return Bishop's properties to their *status quo ante* state. However, Bishop did prove by a preponderance of the evidence and, in fact, Piendak admitted, that Beckrich placed stone base on the Unpaved Spur.[65]

Additionally, the Court finds that a preponderance of the evidence demonstrates that Beckrich, or its agents, changed the grading of the Unpaved Spur and Vachris Property. While the Court does not find Bishop more or less credible than Piendak

---

62 *See id*. at 581-83 (Robinson).

63 DX 45 at 47.

64 *Compare id*. at 44 *with id.* at 54.

65 *See* Tr. at 615.

generally, the evidence supports Bishop's rendition of the facts regarding the change in the grade of the land and resulting alteration of drainage.

Though Beckrich denies placing any fill on the Vachris Property or Unpaved Spur, it admits to having worked to level out fill already present on the properties.[66] The evidence shows that elevations of the Unpaved Spur and Vachris Property were changed sometime between the years 1995 and 2004.[67] Within this timeframe only two parties reasonably could have been responsible for the change in topography, Beckrich or its predecessor, Krauss.[68] When shown pictures of the current elevation of the Unpaved Spur and portions of the Vachris Property, both Krauss and Vachris testified that there had been a change in elevation since the time they sold their properties to Beckrich and Bishop, respectively.[69] While Krauss, as the only suspect party other than Beckrich, may have been motivated to deny responsibility for the change in elevation, his testimony was corroborated by Vachris who had no such motive. Additionally, Piendak admitted not knowing whether his employees had done anything other than level out the piles of fill already present on the properties and lay a stone base in order to make the steep slope

---

66 *Id*. at 614-16 (Piendak).

67 *See* DX 36; Tr. at 508, 510-11 (O'Keefe).

68 As discussed *supra*, Bishop and Vachris had no motivation to change the elevation of the Unpaved Spur or the Vachris Property. The creation of wetlands on the properties probably would reduce their value. On the other hand, Beckrich and Krauss, both of whom had plans to utilize the back portion of the Beckrich Property and the Spur to access it, were motivated to make access to that portion of the Beckrich Property easier by lessening the severity of the steep hill that previously existed there.

69 DX 45 at 36-40; Tr. at 294 (Vachris).

between the Unpaved Spur and the back of the Beckrich Property more gentle.[70] Therefore, the Court finds that Bishop has demonstrated by a preponderance of the evidence that Beckrich, or its agents, changed the grading of the Unpaved Spur and Vachris Property.

The change in the topography of the Unpaved Spur and parts of the Vachris Property caused a change in the pre-existing drainage pattern. In July 1998, less than a year before Beckrich purchased the adjacent property, Vachris hired James C. McCulley, IV, an expert in environmental science and a professional wetlands scientist, to determine the extent of wetlands then present on the Vachris Property. McCulley recorded the flow of waters and location of wetlands on the Vachris Property and Unpaved Spur.[71] In April 2004, McCulley visited the Vachris Property and Unpaved Spur in his capacity as an expert witness for Bishop. McCulley again recorded the flow of waters and location of wetlands on the Vachris Property. Specifically, McCulley observed a new area of standing water at the end of the Paved Spur that was draining onto the Vachris Property.[72] McCulley determined that the area onto which this water was draining was developing as wetlands. In 1998, McCulley had not observed this area of standing water, drainage down into the Vachris Property or developing wetlands; they were all new.[73]

---

70 *See* Tr. at 183, 616-617. Nothing in the record suggests there was any impediment to Beckrich calling witnesses with more direct knowledge of exactly what was done.

71 *Id*. at 546-47 (McCulley).

72 *See id*. at 549-54.

73 *See id*. at 549-50.

A private nuisance is anything that results in harm, inconvenience or damage, or which materially interferes with the enjoyment of rights or property of a particular entity.[74] Trespass is entry onto real property without the permission of the owner, and may consist of the intrusion of water that interferes with plaintiff's use of their property.[75] In this case a path of water, created by Beckrich when it trespassed onto the Unpaved Spur and Vachris Property without permission and leveled piles of fill and added a stone base, continues to flow into the interior of the Vachris Property creating a developing wetland. The resulting change in the Vachris Property from non-wetland to developing wetland is damage that materially interferes with Bishop's enjoyment of his rights or property. Therefore, this flow of water constitutes a continuing nuisance and trespass. Thus, Bishop, as the current owner of the Unpaved Spur and Vachris Property, has the right to demand an abatement of the continuing nuisance of water draining onto his property. Additionally, Beckrich's unauthorized placement of stone base on the Unpaved Spur constitutes trespass and contributes to the altered drainage path problem.

The Court does not find this damage speculative as Beckrich suggests. Beckrich emphasizes that the affected area of the Vachris property is not yet a government protected wetland but rather only a "developing wetland." Such a change in condition, however, still constitutes damage. Bishop's expert McCulley testified that the Corps of Engineer can stop development projects in order to gather more data even if they

---

74 *See Cunningham*, 121 A. at 654. *See also Restatement (Second) of Torts* § 821D.

75 *See Gordon*, 2002 WL 550472, at *5; *Alfieri*, 1984 WL 478437, at *3.

determine only that the area is potential wetlands.[76] Thus, damages already exist in this case. Unless corrective action is taken, the extent of those damages may become more serious in the future.

Bishop seeks remediation of the developing wetland area to stop that development. Beckrich argues that no remediation is necessary because the property may not reach wetlands status for at least two years. Though courts will not "issue an injunction by reason of mere apprehension of uncertain speculative damage at an indefinite time in the future," Bishop's claim does not present such a situation.[77] McCulley expressed the opinion that it would take approximately two years for wetlands to develop to the point of being protectable. Such a period determined by an expert is not an indefinite time. Therefore, Bishop is entitled to remediation of the damage caused by the altered drainage onto the Vachris Property.[78]

"[O]nce a right to relief in Chancery has been determined to exist, the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted so as to enforce particular rights and liabilities legitimately connected with the

---

[76] Tr. at 557.

[77] *See Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 505 (Del. 1980).

[78] Additionally, the Court rejects Beckrich's argument that the measure of damages should represent the difference in the value of the land before versus after the trespass or nuisance. Though this measure is frequently applied to calculate damages resulting from trespass, "if restoration of the property is feasible that might prove a more appropriate and less economically wasteful measure." *Alfieri*, 1984 WL 478437, at *4. Because wetlands are likely to develop on the Vachris Property if the current flow of water is not abated, the Court finds remediation of the condition, including removal of the stone base, a more appropriate remedy here.

subject matter of the action."[79] McCulley testified that three steps should be taken to stop the development of wetlands on the Vachris Property: (1) the drainage pattern must be returned to its prior path along the property lines; (2) the developing wetlands on the Vachris Property caused by the altered drainage should be monitored on an ongoing basis; and (3) the area should be replanted with non wetland species.[80] The amount of damages Bishop requests to take these steps is $106,415.[81]

Beckrich argues that the second and third steps recommended by McCulley are unnecessary and that Bishop could have prevented the need for such measures by taking any number of precautionary steps during the close to five years this litigation has been pending. Bishop argues that the existence of phragmites, an invasive species of wetland plant, in the affected area necessitates the second and third steps of monitoring and replanting. Regardless of any duty to mitigate that might exist, McCulley testified that eliminating the water on the affected area of Vachris Property would eliminate one of the three factors necessary for a finding of wetlands.[82] Therefore, the Court finds that the second and third steps recommended by McCulley are unnecessary to alleviate the damages Bishop has suffered.

Furthermore, the Court does not find Bishop's reasons for failing to mitigate damages persuasive. Bishop continuously claimed to have suffered damages from the

---

79 *Wilmont*, 202 A.2d at 580.

80 *See* Tr. at 555-60 (McCulley).

81 This includes the cost of removing the fill and stone base.

82 *See* Tr. at 563.

change in drainage pattern throughout the five years that this litigation has continued.[83] During this time Bishop could have, but did not, take steps to stop the drainage of water onto its property. Bishop argues that, as a lay person, he could not have understood the damages that were created by allowing water to continue to flow onto the Vachris Property. The record, however, demonstrates that Bishop had wetlands experts analyze the extent of protectable wetlands on the Vachris Property before he purchased it in 1998.[84] Therefore, Bishop had at least a general understanding of the factors for finding land to be protectable wetlands before this litigation. Additionally, I find Bishop's excuse that he did not receive the expert report setting forth the three-step remedy until 2004 unconvincing. Bishop asserted his counterclaim in March 2001. Beckrich propounded interrogatories seeking Bishop's damages contentions as early as April 2001. Yet, Bishop provided no details of his damages claim until a few months before trial.

The flow of water onto the Vachris Property is a continuing nuisance. Additionally, Beckrich trespassed onto Bishop's property when it put stone base on the Unpaved Spur, thereby contributing to the altered drainage path that created the nuisance. The Court, therefore, orders Beckrich to remove the stone base it put on the Unpaved Spur and to redirect the drainage to its prior path along the property line. Based on the animosity that exists between the parties, this work will be done according to a Court

---

83 *See* Defs.' Countercl. ¶¶ 33-36.

84 *See* Tr. at 546 (McCulley).

approved schedule and to the satisfaction of an agreed upon wetlands expert, hired at the expense of Beckrich, to ensure that the drainage is returned to its prior path.[85]

III. CONCLUSION

For the reasons stated above, the Court finds that the Easement and Maintenance Agreement conveyed an easement over the property outlined in the As Built Plan rather than the Road Construction Plan. Therefore, Beckrich, as the successor-in-interest to one of the parties to the Agreement, has an easement over the Paved Spur. Beckrich, however, does not possess an easement over the Unpaved Spur. Beckrich's request for a permanent injunction against Bishop to prevent interference with Beckrich's use of the Spur is denied. Additionally, the Court denies as premature Bishop's request for a declaratory judgment regarding the permissibility of the addition of a curb cut and Beckrich's related request for injunctive relief.

Bishop is entitled to judgment in his favor on his counterclaim that the altered drainage of water onto the Vachris Property caused by Beckrich's placement of stone base on the Unpaved Spur and modification of the grading of the Unpaved Spur and Vachris Property constitutes nuisance and trespass. Beckrich therefore will be ordered to

---

[85] Bishop requests that Richards Paving not be permitted to perform the work necessary to redirect the drainage to its prior path along the property line because he distrusts Beckrich and its principal, Piendak. It is, however, well settled that "the powers of the Court are broad and the means flexible to shape and adjust the precise relief to be granted." *Wilmont*, 202 A.2d at 580. Additionally, I am hesitant to hold Beckrich responsible for the greater expense of having a different contractor do the remediation work when Bishop presented no evidence regarding the extent of the loss of value, if any, of his property. Therefore, I find that under the circumstances of this case, and given that a neutral expert will be appointed to judge the quality of the work, Richards Paving should be permitted to perform the necessary work.

remove the stone base it put on the Unpaved Spur and redirect the drainage to its prior path along the property line to the satisfaction of a mutually agreed upon wetlands expert. The parties should agree upon an expert and a schedule and submit them, together with a proposed form of final judgment, to the Court within thirty days. Beckrich will be responsible for the cost of the expert.

IT IS SO ORDERED.